ALLIANCE FINANCE BHD

v.

KEMAS PERKASA SDN BHD

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[ORIGINATING SUMMONS NO: 24-359-2002]
10 MARCH 2003

LAND LAW: *Sale of land - Order for - Rules of the High Court 1980, O. 83 - Default in loan repayments - Chargor failed to reply to Form 16D notice - Imposition of additional interest on late payment - Whether contravened s. 75 of Contracts Act 1950 - Whether there was cause to the contrary - National Land Code, s. 256 - Whether outstanding amount ought to be reduced - Whether order for sale to be set aside*

The defendant had charged a piece of land to the plaintiff as security in consideration for a term loan. It was a condition that an interest rate of 1.25% per annum above the base lending rate would be levied on monthly rests and a further 1% additional interest per annum on late payment of instalments and/or interest.

Subsequently, the defendant defaulted on the monthly repayments which eventually led to the plaintiff serving a Form 16D notice to the defendant, seeking full settlement of the sum owed which amounted to RM4,724,662.85 within seven days. Thereafter, the plaintiff applied to this court under O. 83 of the Rules of High Court 1980 for an order for sale. The defendant raised several preliminary objections before this court seeking to dismiss the plaintiff's application. It was argued, *inter alia*, that the imposition of additional interest of 1% on late payments, being a "penalty interest", was caught by s. 75 of the Contracts Act 1950. Therefore, the existence of the said penalty ought to render a subsequent order for sale wrong and inequitable.

Held:

[1] In an application under O. 83 r. 1(1)(b) of the RHC for an order for sale by public auction of a charged land, the court ought to consider (i) whether the Form 16D notice had been duly served unto the defendant; (ii) whether there was due procedural compliance with O. 83 of the RHC; and (iii) whether the defendant succeeded in showing "cause to the contrary" under s. 256 of the National Land Code ('NLC'). (p 317 e-g)

[1a] Based on the facts, the plaintiff had complied with the aforementioned requirements. The defendant, on the other hand, had failed to make any payments after receiving the Form 16D notice within the stipulated period. (p 317 h)

[2] The defendant had failed to prove that there was any cause to the contrary as to why the order sought for ought not be granted. Whilst the imposition of additional interest *vide* the relevant clauses in the loan agreements contravened s. 75 of the Contracts Act 1950 and were therefore void and unenforceable, nevertheless this factor did not constitute a cause to the contrary as this court is empowered under s. 256 of the NLC to grant an order for sale albeit for a lesser amount. Thus, the plaintiff's application for an order for sale was granted though the default amount was to be reduced to RM4,716,347.03, *ie*, after deducting the sum of RM8,315.82 being the additional interest. (pp 318 h & 319 a-b, h)

[Application granted with costs.]

Case(s) referred to:
Adnan Johan v. PP [1996] MLJU 34 ***(dist)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 FC ***(refd)***
Malayan Banking Bhd v. Chong Hin Trading Co Sdn Bhd [2001] 6 CLJ 263 HC ***(foll)***
Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn [2000] 1 CLJ 346 CA ***(dist)***
Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd [1996] 3 CLJ 823 FC ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 75
National Land Code, s. 256(3)
Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 28 r. 3(2), O. 41 rr. 10(2), 11(2), O. 83 rr. 1(1)(b), 2(3)

For the plaintiff - Ong Ming Suan; M/s Chor Pee Anwarul & Co
For the defendant - Mary Lim; M/s Lim Cheng Poh, Lim & Rahim

Reported by M Maheswaran

JUDGMENT

Su Geok Yiam JC:
This is an application *vide* an originating summons (encl. 3) by the plaintiff for an order for sale of a piece of land by way of public auction pursuant to O. 83 of the Rules of the High Court 1980 (hereinafter referred to as "the RHC").

It is supported by the affidavit of Malvinder Kaur, the plaintiff's manager, affirmed on 21 February 2002 and filed on the same date.

Facts And Background

The relevant facts are, briefly, as follows:

The defendant is the registered owner of a piece of land held under Grant Registration No: 43766 Lot No. 534, Mukim 10, Barat Daya District, Pulau Pinang (hereinafter referred to as "the said land").

By a charge registered on 3 December 1996, Charge No: 21904/96, Volume 715, Folio 192 (hereinafter referred to as "the said charge") the defendant charged the said land to the plaintiff as security for a term loan of RM3,450,000 (hereinafter referred to as "the said loan") together with interest thereon at the rate of 1.25% per annum above the Base Lending Rate (BLR) on monthly rests and additional interest at the rate of 1% per annum on late payment of installments and/or interest.

It was a condition of the said charge that the said loan was repayable on demand upon the defendant's default or breach of any of the terms of the said charge.

Subsequently, on 17 March 1999, upon the defendant's request the plaintiff agreed to restructure the said loan into two separate accounts of RM103,000 and RM3,600,000, respectively, with interest thereon at the rate of 2.0% per annum above the Base Lending Rate (BLR) on monthly rests and additional interest at the rate of 1% per annum on late payment of installments and/or interest.

The conditions in respect of the first account are, *inter alia*, as follows:

(a) the interest is to be paid monthly; and

(b) the full repayment of the loan is to be made at the end of the loan period or the discharge of the said charge, whichever is earlier.

The conditions in respect of the second account, are, *inter alia*, as follows:

(a) the interest is to be paid annually; and

(b) the full repayment of the loan is to be made at the end of the loan period or the discharge of the said charge, whichever is earlier.

Subsequently, the defendant defaulted on both accounts by failing to pay the monthly and yearly interests. By a letter dated 15 June 2001 sent by the plaintiff solicitors to the defendant, the plaintiff demanded that the defendant pay arrears

of interest amounting to RM3,698.69 and RM346,040.60, respectively, in respect of the two accounts as of 12 June 2001 (hereinafter referred to as "the first letter of demand") (exh. "C", encl. (1)).

Upon the defendant's failure to comply with the first letter of demand, the plaintiff sent another letter dated 23 August 2001 to the defendant recalling both the loans and demanding that the plaintiff pay the sum of RM4,121,273.89 being the full amount outstanding as of 22 August 2001 (hereinafter referred to as "the second letter of demand") (exh. "D", encl. (1)). The defendant having failed to comply with the second letter of demand, the plaintiff sent to the defendant a Form 16D notice dated 23 January 2002 demanding that the defendant pay the sum of RM4,121.273.89 as of 22 August 2001 within seven days from the date of the service of the notice on the defendant failing which the plaintiff would apply for an order of sale (exh. "E", encl. (1)). The two letters of demand and the Form 16D notice were duly served on the defendant by way of posting by registered post to the defendant's registered address and also business address and proof of posting was duly exhibited in the plaintiff's supporting affidavit.

Plaintiff's Application For Order For Sale

On 21 February 2002, the plaintiff filed the originating summons (encl. (3)). The originating summons and the plaintiff's supporting affidavit were served on the defendant by way of registered post and there is an affidavit of service with proof of posting (exh. "RA2", (encl. (4)).

On 26 March 2002, the defendant entered his appearance by filing the memorandum of appearance (encl. 6).

Defendant's Preliminary Objections

On 9 April 2002, the defendant filed his first affidavit-in-reply (encl. 5) in which he raised the following preliminary objections:

(a) the plaintiff's originating summons is defective because it is not supported by any affidavit since the plaintiff's supporting affidavit (encl. (1)) was filed prior to the filing of the plaintiff's originating summons;

(b) the plaintiff's supporting affidavit (encl. (1)) is defective because it was not stamped pursuant to O. 41 r. 10 of the RHC;

(c) the plaintiff's supporting affidavit (encl. (1)) is also defective because the jurat is not in compliance with form 78 of the RHC;

(d) the exhibits referred to in the plaintiff's supporting affidavit (encl. (1)) were not attested to by the commissioner for oaths; and

(e) there is no endorsement in the plaintiff's supporting affidavit (encl. (1)) stating that the plaintiff intends to require the defendant to surrender vacant possession of the said land to the plaintiff and setting out the other reliefs as prayed for by the plaintiff in the originating summons;

Defendant's Denials And Contentions

In his first affidavit-in-reply (encl. (5)) the defendant also denied the said charge, that the restructuring of the said loan was at the defendant's request, that it received the Form 16D notice and that it had failed to remedy the breach within seven days from the date of receipt of the Form 16D notice.

The defendant further contended as follows:

(a) the plaintiff is not a licensed finance company and, therefore, there is a probability the deponent was not authorised to affirm the supporting affidavit;

(b) the interest of 1% chargeable on late payment of installment and interest contravenes s. 75 of the Contracts Act 1950 (hereinafter referred to as "the Contracts Act");

(c) as the sum of RM4,121,273.89 claimed by the plaintiff includes penalty interest, the plaintiff's claim is in contravention of s. 75 of the Contracts Act;

(d) the plaintiff has no cause of action against the defendant because the plaintiff has not terminated the loans and, therefore, the plaintiff's claim is premature;

(e) the plaintiff's application for an order for the sale of the said land and for vacant possession is invalid and inequitable; and

(f) the plaintiff's application should be dismissed with costs.

On 19 April 2002, the plaintiff filed an affidavit (encl. 8) replying to all the points raised by the defendant in the defendant's first affidavit-in-reply (encl. (5)).

On 29 April 2002, the defendant filed its second affidavit-in-reply (encl. 9) to the plaintiff's affidavit-in-reply (encl. (8)) reiterating and maintaining the points it had raised in encl. (5).

On 11 November 2002, the court heard submissions from Miss Ong Ming Suan, learned counsel for the plaintiff, and Miss Mary Lim, learned counsel for the defendant.

Decision Of The Court

On 14 January 2003, after hearing further submissions from both the learned counsels, the court granted an order in terms of the plaintiff's application (encl. 3) for a sum of RM4,716,347.03 instead of RM4,724,662.85, as stated in the plaintiff's latest affidavit affirmed on 13 January 2003, after deducting a sum of RM8,315.82 being interest charged by the plaintiff in respect of late payments.

The reasons why the court made the order are as follows:

First, the court is satisfied that the defendant's preliminary objections are devoid of any merit.

Whether Affidavit-In-Support Complies With O. 28 r. 3(2) Of RHC

In respect of the first preliminary objection, Miss Mary Lim informed the court that the plaintiff's originating summons and affidavit-in-support were served on the defendant on the same day. She submitted that the affidavit-in-support should have been filed a day later. In my opinion, O. 28 r. 3(2) of the RHC does not prevent a party from filing any affidavit in support of an originating summons before or on the same day as the date on which the originating summons is filed. The provision merely requires the service of the affidavit to be made within seven days after the service of the originating summons.

Even assuming the court is wrong to so rule, the non-compliance is saved by the insertion of a new sub-r. (3) to O. 2 of the RHC *vide* P.U.(A) 197/02 which came into force on 16 May 2002. Order 2 r. (3) expressly provides that any preliminary objection by any party only on the ground of non-compliance of any rule of court shall not be allowed unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. The same amendment also inserted a new provision, O. 1A, which expressly requires a court or judge to have regard to the justice of the case in administering any of the rules and not only to the technical non- compliance of any of the rules. In this case, there is no contention by the defendant that the non-compliance, if any, has occasioned a substantial miscarriage of justice.

Whether Affidavit-In-Support Complies With O. 41 r. 10(2) Of RHC

In respect of the second preliminary objection, I am satisfied that the affidavit has been duly stamped with the appropriate fee in accordance with O. 41 r. 10(2) of the RHC. This is so even though the stamp for the fee appears on the endorsement page (encl. (2)) of the affidavit instead of on the first page of the affidavit.

Whether Jurat Complies With Form 78 Of RHC

In respect of the third preliminary objection, the court is satisfied that the jurat in the plaintiff's supporting affidavit (encl. (1)) complies with Form 78 of the RHC and is in order although there is no intitulement similar to that on the first page of the affidavit. The reason is because the jurat did not appear on a completely new page. There is a continuation of para. 12 and a new para. 13 above the jurat which distinctly connect the contents of the affidavit on the preceding pages to the jurat on the last page and by virtue of that, the intitulement on the 1st page of the affidavit is sufficient. More importantly, O. 92 r. 2A of the RHC expressly provides that it shall not be necessary for the jurat to carry the title of the action.

Whether Exhibits In Affidavit-In-Support Comply With O. 41 r. 11(2) Of RHC

In respect of the fourth preliminary objection, the court is satisfied that the certification and identification of the respective exhibits by the commissioner for oaths on a separate piece of paper preceding the exhibit concerned is not irregular since the separate piece of paper has been similarly intituled as the affidavit-in-support and the originating summons and there is the clear attestation by the commissioner for oaths. There is, therefore, sufficient compliance with O. 41 r. 11(2) of the RHC. With respect, the case of *Adnan bin Johan v. Pendakwa Raya* [1996] MLJU 34, pp. 4 and 5, is distinguishable because the facts of that case do not show that the loose sheet of paper (lembah layang) referred to in that case was similarly intituled and also contained the attestation by the commissioner for oaths. Even assuming that the court is wrong to so rule, and there is a non-compliance of O. 41 r. 11(2) of the RHC, the court is, nevertheless, precluded, in the absence of any contention by the defendant that a substantial miscarriage of justice has been occasioned by such non-compliance, from allowing the preliminary objection because of the clear provisions of O. 2 r. 3 and O. 1A of the RHC which have been mentioned earlier on in respect of the first preliminary objection and which have superceded the case.

Whether Endorsement In Affidavit-In-Support Complies With O. 83 r. 2(3) Of RHC

In respect of the fifth preliminary objection, I am of the opinion that the endorsement made on a fresh page similarly intituled as the plaintiff's supporting affidavit and stapled on top of the plaintiff's supporting affidavit and with the words "indorsmen di bawah A. 83 k. 2(3)" written on it and also stating that the plaintiff intends to apply for vacant possession of the said land free from all encumbrances, amongst other reliefs sought, although given a different enclosure number from the supporting affidavit, ie, encl. (2), by the court registry, is a valid endorsement for the purposes of O. 83 r. 2(3) of the RHC.

Secondly, the court having considered the denials and other contentions of the defendant as contained in his first affidavit-in-reply (encl. (5)) in the light of the plaintiff's affidavit-in-support (encl. (1)) and affidavit-in-reply (encl. (8)), is satisfied that the defendant did execute the said charge (exh. "A", encl. (1)) in favour of the plaintiff in respect of the said land, that the restructuring of the said loan was at the defendant's request (exh. "B", encl. (1)), that the plaintiff has terminated the two loan accounts as a result of the defendant's default in paying the monthly and yearly interests (exh. "D", encl. (1)), that the plaintiff is a licensed finance company under the Bank and Financial Institutions Act 1989 (exh. "F", encl. (8)) and that Malvinder Kaur was authorised to affirm the affidavit-in-support on behalf of the plaintiff.

Finally, the court is satisfied that the Form 16D notice was duly served on the defendant, that the plaintiff has complied with the procedure as set out in O. 83 of the RHC and that the defendant has failed to show any cause to the contrary why the order for public auction of the said lands should not be granted as provided for under s. 256(3) of the National Land Code 1965 (hereinafter referred to as "the NLC").

The Law Applicable

The principles governing an application under O. 83 r. 1(1)(b) of the RHC for an order for sale by public auction of charged land have been clearly enunciated in the Federal Court case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36.

In considering whether an order for sale in respect of the said land should be granted to the plaintiff, in this case, the court has to consider the following three issues:

(a) whether the plaintiff has duly served the Form 16D notice on the defendant;

(b) whether the plaintiff has complied with the procedure as set out in O. 83 of the RHC; and

(c) whether the defendant has succeeded in showing "cause to the contrary" under s. 256 of the NLC.

Applying those principles to the facts in the present case, the court is satisfied that the Form 16D notice dated 23 January 2002 has been duly served by registered post on the defendant at the defendant's registered office and business address as evidenced by the two certificate of posting exhibited, collectively, as exh. "E" in the plaintiff's supporting affidavit (encl. (1)). The defendant has also failed to comply with the Form 16D notice within the seven days period specified therein as the defendant did not make payment of the sum

claimed by the plaintiff therein. On 21 February 2002, the plaintiff filed the originating summons and supporting affidavit pursuant to O. 83 of the RHC seeking an order for the sale of the said land by public auction. A copy each of the originating summons and supporting affidavit were duly served on the defendant on 20 March 2002 by registered post as evidenced by the affidavit of service affirmed by Razali bin Azadin, a clerk attached to the legal firm of Messrs. Chor Pee, Anwarul & Company, on 22 March 2002 and filed on 28 March 2002 (encl. (4)).

Whether Imposition Of Interest On Late Payment Of Installments And Interests Constitutes Cause To The Contrary

The only issue left to be considered by the court is whether the imposition by the plaintiff of interest at the rate of 1% on late payment of instalments and interest (hereinafter referred to as "the additional interest") constitutes 'a cause to the contrary'.

Miss Mary Lim has submitted that cl. 3.17 of the annexure to the charge (exh. "A", encl. (1)) and cl. 3.07 of the supplemental agreement (exh. "B", encl. (1)) (hereinafter referred to as "the said clauses") are unenforceable because the additional interest imposed by the two clauses and described in the plaintiff's letter of offer dated 6 June 1996 as a "penalty interest" is a penalty and is caught by the provisions of s. 75 of the Contracts Act. According to her, therefore, since the amount claimed by the plaintiff includes a penalty, it would be wrong and inequitable for the court to grant the order for sale. She relies on the case of *Malayan Banking Berhad v. Chong Hin Trading Co. Sdn. Bhd.* [2001] 6 CLJ 263.

In response, Miss Ong Ming Suan has submitted that since both the parties have agreed to the said clauses the plaintiff is bound to pay the additional interest which is not exorbitant, being only 1%. In support of her submission, she relied on the Court of Appeal case of *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346. She also relied on the Federal Court case of *Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd (in receivership)* [1996] 3 CLJ 823.

She submitted that the defendant has not shown any cause to the contrary as provided for in s. 256 of the NLC.

Having considered the last issue in the light of the submissions by and the authorities cited by both the learned counsels the court is of the opinion that the defendant has failed to show any cause to the contrary why the order for sale sought for should not be granted. First, the court with respect adopts the view of Abdul Wahab Pattail J in the case of *Malayan Banking Berhad v.*

Chong Hin Trading Co Sdn Bhd that the imposition of the additional interest contravenes s. 75 of the Contracts Act because the additional interest is a penalty being an additional sum over and above the normal interest charged at the prevailing rate upon the loan at the time of default and in the absence of any evidence adduced as to the amount of damages actually suffered by the plaintiff. The court, accordingly, rules that the said clauses are void and unenforceable. Nevertheless, in my judgement this does not constitute cause to the contrary because the court can, in exercise of the discretion conferred upon it by s. 256 of the NLC, grant an order for sale not for the amount as claimed by the plaintiff but for a lesser amount arrived at after deducting the amount of the additional interest. The case of *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* is distinguishable because in that case the transaction was not a loan.

Secondly, the case of *Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd (in receivership)* is directly applicable to the facts of the present case. In that case the respondent, a co-operative society, had granted a loan of RM3m to one of its members. As security for the loan, the appellant charged a piece of land in favour of the respondent. Pursuant to cl. 3.2 of the annexure to the charge the appellant had agreed to pay additional interest at the rate of 1 1/3 times the normal ruling rate of interest on the arrears of principal and interest unpaid by the member. The appellant later defaulted on the payment of the additional interest and the respondent obtained a statutory order for sale. The land was subsequently sold by public auction and the proceeds of sale was paid to the respondent. The appellant appealed on the ground, *inter alia*, that the respondent had charged additional interest pursuant to cl. 3.2 which was irrecoverable being a penalty under s. 75 of the Contracts Act.

In dismissing the appeal, the Federal Court held, *inter alia*, that the established measure of damages payable by a borrower in the event of default of payment of arrears of principal and interest is damages for loss of use of fund or money. However, as damages for the loss of use of such money had not been proven cl. 3.2 was void and unenforceable by virtue of s. 75 of the Contracts Act. The Federal Court, accordingly, proceeded to deduct the amount of additional interest computed by virtue of cl. 3.2 from the sum of RM6,827,805.43 as stated in the respondent's originating summons for the order of sale.

In the premises, in the present case, the court allowed the plaintiff's application with costs and granted the order of public auction of the said land as prayed for, for the amount of RM4,716,347.03 after deducting a sum of RM8,315.82 being the additional interest.